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NTSB Order No. EA-3793

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of February, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. EARL E. FREEMAN, Respondent.	Docket SE-10609

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr. at the conclusion of an evidentiary hearing held on September 27, 1990.[1] In that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 30 days for violations of sections 91.75(b) and

[1]Attached is an excerpt from the transcript containing the oral initial decision.

91.9[2] of the Federal Aviation Regulations (FAR), 14 C.F.R. 91.75(b) and 91.9. For the reasons discussed herein, we deny the appeal.

The pertinent facts of this case are as follows. On May 8, 1989, respondent acted as pilot in command of a Piper Malibu on an IFR flight from Kansas City Industrial Airport to Madison, Mississippi, with one passenger on board. There were thunderstorms in the vicinity when respondent took off. Shortly after takeoff a controller at the Kansas City Air Traffic Control Center instructed respondent to fly a particular route towards the Razorback intersection, and to "climb and maintain one five thousand [feet]". Respondent acknowledged the instruction, including the clearance to 15,000 feet.

Over the next several minutes Respondent acknowledged two additional air traffic control (ATC) instructions relating to his route of flight. Then, approximately 11 minutes after respondent's departure, the controller issued this pivotal

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[2]Section 91.75(b) [now § 91.123(b)] provided:

"§ 91.75 Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised."

Section 91.9 [now § 91.13(a)] provided:

"**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

instruction:

> Malibu niner eight yankee ah cleared R NAV direct ah Razorback zero eight three zero six two as filed.

Respondent replied "Nine eight yankee cleared as filed." The controller's next communication to respondent was "Malibu niner eight yankee you can expect higher . . . [remainder of transmission unintelligible]." Respondent asserts that he did not hear this transmission, or any other communications from ATC over the next five minutes. It was during this period of time that respondent ascended above 15,000 feet to approximately 17,000 feet, causing the controller to have to stop the descent of a commercial airliner which had been cleared down to 16,000 feet.

As revealed by the transcript of ATC communications which was introduced into evidence and the controller's testimony at the hearing, in the five minute period during which respondent claims not to have received any communications the controller first asked respondent to state his altitude and, when that request went unanswered, continued to call respondent's aircraft four additional times. Respondent ultimately initiated contact with ATC and said "we are cleared to flight level one nine oh aren't we." The controller responded "negative you were not [cleared to 19,000]," and instructed respondent to maintain 17,000 feet. Respondent answered "my mistake I thought we were cleared to flight level one nine oh," to which the controller explained "your last assigned altitude was one five thousand . .

. maintain [] one seven thousand, expect higher four minutes." Respondent acknowledged the 17,000 altitude assignment, and again stated "we mistook it for one nine thousand."

Respondent makes several arguments on appeal.[3] His primary contention is that the controller's instruction to "climb and maintain one five thousand" was not an altitude assignment, but rather an altitude restriction, which was canceled when the controller subsequently issued the instruction quoted above containing the phrase "as filed" without restating the altitude restriction. In support of this position, respondent cites paragraph 4-14 of the Air Traffic Control handbook, which provides that when route or altitude in a previously issued clearance is amended all applicable altitude restrictions should be restated, and that if such restrictions are omitted they are canceled. Respondent argues that because the phrase "as filed" referred to information listed in his flight plan, the controller's use of that phrase constituted a clearance to ascend to the altitude requested in respondent's flight plan, namely, 19,000 feet.

The controller disputed this interpretation of his instructions, testifying that an altitude restriction is defined as an instruction to be at a certain altitude at a certain time or location, and that 15,000 feet was indeed an altitude assignment, not a restriction. He indicated that "as filed" referred to a later point in respondent's filed route (Madison),

[3]The Administrator has filed a brief in reply.

and that he did not specify that point by name only because he did not know what it was at the time. Also testifying at the hearing were an ATC quality assurance specialist and an aviation safety inspector, both of whom agreed that 15,000 feet was an assigned altitude in this case, not an altitude restriction, and that the instruction which contained the phrase "as filed" related only to respondent's route and did not in any way alter the assigned altitude of 15,000 feet.

Other than his own testimony that he believed "as filed" referred to altitude as well as route, respondent presented no evidence to contradict the Administrator's witnesses. We find respondent's asserted belief to be not only incorrect, but unreasonable. We note that in his own explanations of the incident to the controller and to the inspector investigating this case, prior to having examined the transcript of ATC communications, respondent made no mention of the "as filed" instruction or the altitude he requested in his flight plan, but rather, claimed that he had simply mistaken the 15,000 clearance for 19,000.

In a related argument, respondent contends that the law judge erred when he granted the Administrator's pre-trial motion to preclude the issuance of subpoenas to two air traffic controllers (premised on 49 C.F.R. 9.5)[4], thereby precluding

[4]Section 9.5 provides, in pertinent part:

"(a) . . .an employee of the Department [of Transportation] may not testify as an expert or opinion witness for any party other than the United States in any

respondent from presenting testimony from those controllers. According to respondent, that testimony would have supported his position that (a) the controller in this case used improper phraseology, (b) 15,000 feet was a restriction, and (c) the ATC instruction to fly "as filed" permitted him to ascend to 19,000 feet. Respondent claims that 49 C.F.R 9.5 is inapplicable because that section only precludes FAA employees from giving expert or opinion testimony. Characterizing the expected testimony from the controllers as factual, respondent argues that it is not barred by the rule.

The Board rejects respondent's argument. It is clear both from respondent's request for subpoenas for the controllers[5] and from his descriptions of their expected interpretations of the ATC instructions at issue in this case that respondent sought to elicit expert or opinion testimony from the controllers. That testimony was properly excluded under section 9.5.[6] We have held

(..continued)
legal proceeding in which the United States is involved, but may testify as to facts."

[5]Respondent's subpoena request stated that the anticipated testimony from the controller witnesses would encompass "the effect of inoperative pitot heat on aircraft instruments in icing conditions; the effect of the weather conditions present at the time of the alleged incident on both aircraft and Center radio reception and transmission; the interpretation of flight progress strips; the meaning and phraseology of ATC clearances; the requirements of the Air Traffic Control Handbook 7110.65E; the meaning of abbreviations contained in certain FAA documents; interpretation of the Federal Aviation Regulations relevant to this incident."

[6]We have recognized the applicability of 49 C.F.R. § 9.5 to Board proceedings. See Administrator v. Elfrink, NTSB Order No. EA-3693 (1992) and Administrator v. Sims and McGhee, 3 NTSB 672 (1977) aff'd, 662 F.2d 668 (10th Cir. 1981).

that testimony from an air traffic controller as to the meaning of an ATC instruction constitutes expert testimony and falls within the purview of section 9.5. Administrator v. Sims and McGhee, 3 NTSB 672, 674 (1977), aff'd, 662 F.2d 668 (10th Cir. 1981). As we noted in Sims and McGhee, and as the law judge mentioned at the hearing in this case, respondent could have properly called upon many other (non-government) experts for this type of testimony. Accordingly, respondent was not unfairly prejudiced by the exclusion of such testimony from government employees.

Respondent also argues that the Administrator has waived the applicability of section 9.5 by virtue of an agreement between the National Air Traffic Controller's Association and the FAA which provides, in Article 27 (titled Jury Duty and Court Leave), Section 4, that employees who are summoned to appear in their unofficial capacity on behalf of any party in a judicial proceeding where the United States is a party are entitled to court leave during their absence. However, the controllers in this case were summoned to testify in their official capacity. Furthermore, it is clear from reading this language in context that it pertains only to the type of leave controllers will be granted for attendance at various types of judicial proceedings, and has no effect on the applicability of section 9.5 to any such proceeding.

We do not agree with respondent's contention that Administrator v. Smith, 3 NTSB 85 (1977) is controlling in this

case. In Smith, our finding that an ATC clearance was unacceptably ambiguous was based on the testimony of the respondent and two other airline pilots that the clearance meant something other than what the controller intended, and on the controller's admission that the instruction there at issue had been misinterpreted by other pilots on prior occasions. In contrast, although the "as filed" instruction in this case might have been phrased differently so as to emphasize that the assigned altitude remained at 15,000, the record in this case does not support a finding that it was unacceptably ambiguous. Respondent also claims that Smith illustrates the relevance of the substance of the excluded controllers' testimony in this case. However, as noted above, respondent was not precluded from presenting relevant expert or opinion testimony from other (non-government) witnesses.

Respondent has also submitted for our consideration five affidavits signed by air traffic controllers (none of whom were involved in this incident, and only one of whom was a subject of respondent's subpoena request) which purport to support respondent's position on these points. The Administrator has moved to strike these affidavits from the record based on 49 C.F.R. § 9.5, and because respondent never attempted to subpoena the testimony of (four of) the controllers prior to the hearing or to proffer any of the affidavits at the hearing. Although it seems likely that any such proffer would have met with strenuous objection by the Administrator based on section 9.5, we agree

that respondent should have attempted to introduce any testimony or affidavits that he thought would support his case at the hearing, thus allowing the law judge to rule on its admissibility. The time for introducing evidence has passed. Accordingly, the Administrator's motion to strike the affidavits from the record is granted.[7]

As an alternate argument respondent submits that at the time his aircraft ascended above 15,000 feet he was experiencing a loss of radio communications (he points to the transcript of ATC communications showing that for five minutes all attempts to reach his aircraft went unanswered) and a pitot heat malfunction, while also contending with thunderstorms and icing conditions. Therefore, respondent contends, even if he did deviate from an assigned altitude of 15,000, that deviation was justified by 14 C.F.R. 91.127(c)[8] (prescribing altitudes to be flown in the event

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[7]In light of this disposition, we need not rule on the Administrator's "motion to take notice," which states that counsel for the Administrator possesses, and will submit to the Board upon request, additional affidavits from the five controllers which place their earlier affidavits "in context."

Respondent's motion for rehearing, made pursuant to 49 C.F.R. 821.50, is also denied without prejudice as that section applies only after the Board has issued its order on appeal from an initial decision.

[8]Section 91.127(c) [now 91.185(c)] provided, in pertinent part:

> "(c) **IFR conditions.** If [two-way radio communications] failure occurs in IFR conditions, . . . each pilot shall continue the flight according to the following:
>
> (2) ALTITUDE. At the highest of the following altitudes or flight levels for the route segment being flown:
>
> (i) The altitude or flight level assigned in the last

of radio failure during an IFR flight) and/or by 14 C.F.R. 91.3(b)[9] (authorizing deviation from the rules in the event of an in-flight emergency). We disagree.

Respondent cannot invoke section 91.127(c) as an affirmative defense because we read that section to apply only in situations where a pilot is aware that he has lost two-way radio communications. Even assuming that respondent was experiencing radio failure at the time of his deviation, as he now claims, it is clear from the record that he did not know it at the time. Respondent testified that he thought the controller might have gone on a break, thus accounting for the five minutes during which he did not receive any communications from ATC. Furthermore, respondent made no mention of any radio failure either to the controller (as required under 14 C.F.R. 91.129 [now 91.187]) or to the inspector who investigated this case. Nor can respondent's deviation be excused under 14 C.F.R. 91.3, because that section also requires a causal connection between

(..continued)

> ATC clearance received;
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> (ii) The minimum altitude (converted, if appropriate, to minimum flight level as prescribed in § 91.81(c)) for IFR operations; or
>
> (iii) The altitude or flight level ATC has advised may be expected in a further clearance."

Respondent argues that he was justified in ascending to 19,000 under (2)(i) or (iii).

[9]Section 91.3(b) states:

> "(b) In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency."

the perceived emergency and the violation. See Administrator v. Wagner, NTSB Order No. EA-3047 (1990) (although radio failure in deteriorating weather conditions constituted an emergency, respondent's violations were not the result of his attempt to compensate for that emergency, and therefore were not within the purview of section 91.3). In this case respondent testified that he did not feel it was necessary to tell the controller of any of the problems he was having on board and, in fact, he never declared that he was experiencing an emergency. In sum, we are not convinced that respondent ascended from 15,000 feet because of a perceived emergency.

Finally, respondent makes several challenges to the law judge's handling of this proceeding, none of which we find compelling. He argues that the law judge improperly acted as an advocate by asking the controller whether respondent understood that he was cleared to 15,000 feet and whether the difference between altitude restrictions and assignments is a technical matter "known among controllers." This was not improper, as it is well within the discretion of the law judge to question witnesses in order to clarify the record. Respondent also argues that the initial decision fails to comply with 49 C.F.R. 821.42 in that the law judge refused to make findings, as requested by respondent, on the issues of radio failure, malfunction of the pitot heat system and loss of airspeed indicator, and the urgency of respondent's situation. However, it is apparent from our reading the initial decision that the law judge made all the

requisite findings, and he only refused to make the additional findings proposed by respondent because they would have supported the affirmative defenses which the law judge had already rejected.

Finally, respondent has not shown that he was prejudiced by the law judge's denial of respondent's request for a subpoena duces tecum requiring the inspector who investigated this incident to produce at the hearing any Form 2150 (apparently involving sanction recommendations) or "Facts and Analysis" forms he might have prepared. Because respondent has not shown that his need for such documents outweighs the FAA's need to protect its investigative and prosecuting functions, such documents are protected from disclosure by the deliberative process privilege. See Administrator v. McClain, 1 NTSB 1542, 1544 (1972) and Administrator v. Hutt and Viking Aviation, Inc., 5 NTSB 2432, 2435 (1987).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order of suspension is affirmed; and

3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.[10]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[10]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).